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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11 BARRY D. WILSON,) NO. EDCV 11-00614-MAN
12 Plaintiff,)
13 v.) MEMORANDUM OPINION
14 MICHAEL J. ASTRUE,) AND ORDER
15 Commissioner of Social Security,)
16 Defendant.)
17

18 Plaintiff filed a Complaint on April 27, 2011, seeking review of
19 the denial by the Social Security Commissioner ("Commissioner") of
20 plaintiff's application for supplemental security income ("SSI"). On
21 May 13, 2011, the parties consented, pursuant to 28 U.S.C. § 636(c), to
22 proceed before the undersigned United States Magistrate Judge. The
23 parties filed a Joint Stipulation on February 16, 2012, in which:
24 plaintiff seeks an order reversing the Commissioner's decision and
25 awarding benefits or, alternatively, remanding for further
26 administrative proceedings; and the Commissioner requests that his
27 decision be affirmed or, alternatively, remanded for further
28 administrative proceedings.

1 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

2

3 On February 25, 2008, plaintiff filed an application for SSI,

4 alleging an inability to work since January 1, 2000, due to his mental

5 condition. (Administrative Record ("A.R.") 19, 121.) Plaintiff has

6 past relevant work experience as a "commercial/industrial cleaner" and

7 as a "sales clerk for illegal drugs." (A.R. 25.)

8

9 The Commissioner denied plaintiff's application initially and upon

10 reconsideration. (A.R. 19, 51-55, 57-61.) On February 3, 2010,

11 plaintiff, who was represented by counsel, appeared and testified at a

12 hearing before Administrative Law Judge Joseph Schloss (the "ALJ").

13 (A.R. 19, 29-48.) Vocational expert Sandra Fioretti also testified.

14 (*Id.*) On March 19, 2010, the ALJ denied plaintiff's claim (A.R. 19-25),

15 and the Appeals Council subsequently denied plaintiff's request for

16 review of the ALJ's decision (A.R. 1-6). That decision is now at issue

17 in this action.

18

19 **SUMMARY OF ADMINISTRATIVE DECISION**

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21 The ALJ found that plaintiff has not engaged in substantial gainful

22 activity since February 25, 2008, his application date. (A.R. 21.) The

23 ALJ determined that plaintiff has the severe impairment of "mood

24 disorder," but he does not have any impairment or combination of

25 impairments that meet or medically equal one of the listed impairments

26 in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. §§ 416.920(d),

27 416.925 and 416.926). (*Id.*)

1 After reviewing the record, the ALJ determined that plaintiff has
2 the residual functional capacity ("RFC") to perform a full range of work
3 at all exertional levels but with the following non-exertional
4 limitation: "[plaintiff] can perform simple repetitive tasks as well as
5 moderately complex tasks." (A.R. 22.)

6
7 The ALJ found that plaintiff's past relevant work, as a
8 "commercial/industrial cleaner" and as a "sales clerk for illegal
9 drugs," does not require the performance of work-related activities
10 precluded by plaintiff's RFC. (A.R. 25.) Accordingly, the ALJ
11 concluded that plaintiff has not been under a disability, as defined in
12 the Social Security Act, since February 25, 2008, the date his
13 application was filed. (*Id.*)

14 15 STANDARD OF REVIEW

16
17 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's
18 decision to determine whether it is free from legal error and supported
19 by substantial evidence. Orn v. Astrue, 495 F.3d 625, 630 (9th Cir.
20 2007). Substantial evidence is "'such relevant evidence as a reasonable
21 mind might accept as adequate to support a conclusion.'" *Id.* (citation
22 omitted). The "evidence must be more than a mere scintilla but not
23 necessarily a preponderance." Connett v. Barnhart, 340 F.3d 871, 873
24 (9th Cir. 2003). "While inferences from the record can constitute
25 substantial evidence, only those 'reasonably drawn from the record' will
26 suffice." Widmark v. Barnhart, 454 F.3d 1063, 1066 (9th Cir.
27 2006)(citation omitted).

1 Although this Court cannot substitute its discretion for that of
2 the Commissioner, the Court nonetheless must review the record as a
3 whole, "weighing both the evidence that supports and the evidence that
4 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of
5 Health and Hum. Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also
6 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is
7 responsible for determining credibility, resolving conflicts in medical
8 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d
9 1035, 1039 (9th Cir. 1995).

10
11 The Court will uphold the Commissioner's decision when the evidence
12 is susceptible to more than one rational interpretation. Burch v.
13 Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may
14 review only the reasons stated by the ALJ in his decision "and may not
15 affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d
16 at 630; see also Connett, 340 F.3d at 874. The Court will not reverse
17 the Commissioner's decision if it is based on harmless error, which
18 exists only when it is "clear from the record that an ALJ's error was
19 'inconsequential to the ultimate nondisability determination.'" Robbins
20 v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006) (quoting Stout v.
21 Comm'r, 454 F.3d 1050, 1055 (9th Cir. 2006)); see also Burch, 400 F.3d
22 at 679.

23 24 DISCUSSION

25
26 Plaintiff alleges the following issues: (1) whether the ALJ
27 properly considered the presence of a severe physical impairment;
28 (2) whether the ALJ properly considered the opinion of treating

1 psychiatrist Donna Barrozo, M.D.; and (3) whether the ALJ properly
2 considered plaintiff's testimony. (Joint Stipulation ("Joint Stip.") at
3 3.)

4
5 **I. The ALJ Failed To Properly Consider The Opinion Of**
6 **Treating Physician Lilybeth Sistoza, M.D., In Determining**
7 **Whether Plaintiff Has A Severe Physical Impairment.**
8

9 The opinions of treating physicians are entitled to the greatest
10 weight, because the treating physician is hired to cure and has a better
11 opportunity to observe the claimant. Magallanes v. Bowen, 881 F.2d 747,
12 750 (9th Cir. 1989). When a treating physician's opinion is not
13 contradicted by another physician, it may be rejected only for "clear
14 and convincing" reasons. Lester v. Chater, 81 F.3d 821, 830 (9th Cir.
15 1995)(as amended).
16

17 Here, the ALJ failed to give proper weight to the opinion of
18 plaintiff's treating physician Dr. Lilybeth Sistoza. On December 23,
19 2009, Dr. Sistoza completed a physical RFC questionnaire, which
20 indicates that: "[plaintiff]'s capabilities are limited to standing
21 and/or walking 2 hours in an 8-hour workday and sitting 2 hours in an 8-
22 hour workday," and plaintiff "can lift/carry 10 pounds or less
23 occasionally and that he would miss at least 2 days of work per month
24 due to his impairments." (A.R. 24; *citing* A.R. 320-23.) The ALJ stated
25 that he gave "very little weight" to Dr. Sistoza's opinion, for several
26 reasons. (A.R. 24.)
27

28 The first reason proffered by the ALJ as a basis for discrediting

1 Dr. Sistoza's opinion is the ALJ's asserted inability to find Dr.
2 Sistoza's signature anywhere in plaintiff's treatment records. The ALJ
3 misstates the record in asserting that: "Dr. Sistoza purports to be
4 [plaintiff]'s treating physician at Fontana Family Medical Center
5 although her signature does not appear in those treatment records."
6 (A.R. 24.) A simple review of the record reveals that Dr. Sistoza's
7 signature appears on many of plaintiff's treatment records, including
8 Fontana Family Medical Center Progress Notes ("Progress Notes") dated
9 December 11, 2008, February 24, 2009, and September 14, 2009. (A.R.
10 323, 262-64, 268-69, and 275.) Consequently, the ALJ's statement is
11 factually incorrect and, thus, cannot support his finding that plaintiff
12 lacks credibility. See Regennitter v. Commissioner, 166 F.3d 1294, 1297
13 (9th Cir. 1999)(the ALJ's "inaccurate characterization of the evidence"
14 to support his adverse credibility finding warranted reversal).

15
16 Further, if the ALJ questioned whether there was an objective basis
17 for Dr. Sistoza's opinion, the ALJ should have conducted an "appropriate
18 inquiry" by re-contacting Dr. Sistoza. Indeed, "[i]t is the ALJ's duty
19 to investigate the facts and develop the arguments both for and against
20 granting benefits." Sims v. Apfel, 530 U.S. 103, 110-11 (2000); see
21 also, Smolen v. Chater, 80 F.3d 1273, 1288 (9th Cir. 1996)("[i]f the ALJ
22 thought he needed to know the basis of [the doctors'] opinions in order
23 to evaluate them, he had a duty to conduct an appropriate inquiry");
24 Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1993)(the ALJ "has a
25 special duty to fully and fairly develop the record and to assure that
26 the claimant's interests are considered"); 20 C.F.R. § 416.912(e)(when
27 a medical source's report "contains a conflict or ambiguity," the Social
28 Security Administration "will seek additional evidence or

1 classification").

2
3 Second, the ALJ concluded that Dr. Sistoza's opinion, as set forth
4 in the physical RFC questionnaire, is "not supported by the Fontana
5 Family Medical Center treatment records[,] which indicated that
6 [plaintiff], upon physical examination, was found to be normal on all
7 areas addressed by Dr. Sistoza." (A.R. 24; internal citations omitted.)
8 However, the ALJ's statement that plaintiff had only normal findings
9 also is not supported by the record. In the Progress Notes dated
10 September 14, 2009, Dr. Sistoza noted an abnormal finding related to
11 plaintiff's eyes. (A.R. 275.) Further, while the ALJ is correct that
12 the remaining categories in each of the Progress Notes were marked
13 either normal or not examined, the September 14, 2009 Progress Notes
14 noted plaintiff's history of hypertension and hyperlipidemia. (*Id.*)
15 Moreover, Dr. Sistoza noted that plaintiff was obese, and she diagnosed
16 him with hypertrophic cardiomyopathy. (*Id.*) In view of these findings,
17 which were overlooked by the ALJ, the ALJ's rejection of Dr. Sistoza's
18 opinion on the ground that the treatment records showed that plaintiff
19 was "normal on all areas" was inaccurate and, thus, was not clear and
20 convincing.

21
22 Neither reason cited by the ALJ for rejecting Dr. Siztoza's opinion
23 was clear and convincing. Thus, the ALJ's treatment of Dr. Soztoza's
24 opinion was error.

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1 **II. The ALJ Failed To Set Forth The Requisite Specific And**
2 **Legitimate Reasons For Rejecting The Opinion Of**
3 **Plaintiff's Treating Psychiatrist.**
4

5 When the ALJ rejects the opinion of a treating physician that has
6 been contradicted, the ALJ may reject that opinion only by providing
7 specific and legitimate reasons for doing so, supported by substantial
8 evidence in the record. Lester, 81 F.3d at 830. In the hierarchy of
9 physician opinions considered in assessing a social security claim,
10 "[g]enerally, a treating physician's opinion carries more weight than an
11 examining physician's, and an examining physician's opinion carries more
12 weight than a reviewing physician's." Holohan v. Massanari, 246 F.3d
13 1195, 1202 (9th Cir. 2001); 20 C.F.R. § 416.927. Broad and vague
14 reasons will not suffice for rejecting the treating physician's opinion.
15 McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989).
16

17 On October 29, 2009, Dr. Donna Barrozo, M.D., plaintiff's treating
18 psychiatrist, completed a mental RFC questionnaire, in which she opined
19 that plaintiff has "marked" or "extreme" limitations in his mental RFC
20 in the categories of understanding and memory, sustained concentration
21 and persistence, social interaction, and adaptation. (A.R. 295-
22 96.) Dr. Barrozo also opined that plaintiff would miss more than four
23 days of work a month as a result of these limitations. (A.R. 296.) The
24 ALJ also gave "very little weight to Dr. Barrozo's questionnaire
25 responses," because "[t]he treatment notes from exactly the same time
26 period completely contradict the responses on the mental [RFC]
27 questionnaire." (A.R. 24.) Instead, the ALJ gave "great weight to the
28 opinion of the State Agency reviewing mental health consultants." (*Id.*)

1 Contrary to the ALJ's finding, the information Dr. Barrozo provided
2 in the questionnaire is not necessarily inconsistent with her treatment
3 notes. The ALJ relied on Dr. Barrozo's treatment notes dated April 20,
4 May 20, June 29, September 8, October 19, and November 16, 2009, which
5 indicate, with regard to auditory and visual hallucinations, that
6 plaintiff has few or "none" at this time and that plaintiff's depression
7 had improved. (A.R. 311-19.) The ALJ, however, fails to explain how
8 limitations in such categories "completely contradict" Dr. Barrozo's
9 April 20, to November 16, 2009 treatment notes. (A.R. 24.) An absence
10 of auditory or visual hallucinations on the date Dr. Barrozo examined
11 plaintiff and wrote these treatment notes would not preclude a finding
12 that plaintiff has a limitation in, for example, "the ability to
13 remember locations and work-like procedures." (A.R. 295.) That someone
14 is not experiencing hallucinations does not, ipso facto, mean that he
15 also does not suffer from any mental health issues. Similarly, an
16 improvement in plaintiff's depression does not establish that plaintiff
17 would not be limited in the ways indicated by Dr. Barrozo's treatment
18 notes. If the ALJ questioned whether there was an objective basis for
19 Dr. Barrozo's opinion, the ALJ should have conducted an "appropriate
20 inquiry" by re-contacting Dr. Barrozo. See Sims, 530 U.S. at 110-11;
21 see also Smolen, 80 F.3d at 1288; Brown, 713 F.2d at 443.

22
23 Significantly, the ALJ fails to acknowledge that, on the same page
24 of Dr. Barrozo's treatment notes as that on which the ALJ relies, Dr.
25 Barrozo also opined that plaintiff is "unable to work" -- an opinion
26 that is consistent with, rather than contrary to, her questionnaire
27 findings. (A.R. 312.) Further, the ALJ overlooks the finding in the
28 questionnaire that plaintiff's GAF score is 40, and Dr. Barrozo's

1 treatment notes indicate that plaintiff's GAF score is 40-50¹ -- again,
 2 findings that are consistent. (A.R. 292, 312.) Thus, the ALJ's
 3 conclusion that "the treatment notes from exactly the same time period
 4 completely contradict the responses on the mental [RFC] questionnaire"
 5 is factually incorrect and unpersuasive, and it does not constitute a
 6 specific and legitimate ground for rejecting Dr. Barrozo's opinion.
 7 (A.R. 24.)

8
 9 Had Dr. Barrozo's opinion been considered properly, her opinion as
 10 that of a treating physician should have carried more weight than that
 11 of the State agency physician. See 20 C.F.R. § 416.927 (d)(2) (stating
 12 that generally greater weight is afforded to treating physicians, as
 13 they are likely the medical professionals most able to provide a
 14 detailed, longitudinal picture of the claimant's medical impairment(s)
 15 and may bring a unique perspective to the medical evidence that cannot
 16 be obtained from objective medical findings alone or from reports of
 17 individual examinations, such as consultative examinations). Further,
 18 as a treating physician specializing in psychiatry, Dr. Barrozo's
 19 opinion should have been given additional weight. See 20 C.F.R.
 20 § 416.927(d)(5); see, e.g., Benecke v. Barnhart, 379 F.3d 587, 594 n.4
 21 (9th Cir. 2004)(stating that opinion of specialist about medical issues

22
 23 ¹ The GAF scale "[c]onsider[s] psychological, social, and
 24 occupational functioning on a hypothetical continuum of mental health-
 25 illness." *Diagnostic and Statistical Manual of Mental Disorders*, DSM-
 26 IV-TR, 34 (rev. 4th ed. 2000). A rating of 31-40 reflects "[s]ome
 27 impairment in reality testing or communication (e.g., speech is at times
 28 illogical, obscure, or irrelevant) OR major impairment in several areas,
 such as work or school, family relations, judgment, thinking or mood
 (e.g., depressed man avoids friends, neglects family, and is unable to
 work . . .)." *Id.* A rating of 41-50 reflects "[s]erious symptoms
 (e.g., suicidal ideation, severe obsessional rituals, frequent
 shoplifting) OR any serious impairment in social, occupational, or
 school functioning (e.g., no friends, unable to keep a job)." *Id.*

1 related to that specialist's area of specialty is to be given greater
2 weight).

3
4 **III. The ALJ Failed To Give Clear And Convincing Reasons For**
5 **Finding Plaintiff's Testimony To Be Not Credible.**
6

7 Once a disability claimant produces objective medical evidence of
8 an underlying impairment that is reasonably likely to be the source of
9 claimant's subjective symptom(s), all subjective testimony as to the
10 severity of the symptoms must be considered. Moisa v. Barnhart, 367
11 F.3d 882, 885 (9th Cir. 2004); Bunnell v. Sullivan, 947 F.2d 341, 345
12 (9th Cir. 1991); see also 20 C.F.R. § 416.929(a) (explaining how pain
13 and other symptoms are evaluated). "[U]nless an ALJ makes a finding of
14 malingering based on affirmative evidence thereof, he or she may only
15 find an applicant not credible by making specific findings as to
16 credibility and stating clear and convincing reasons for each."
17 Robbins, 466 F.3d at 883. The factors to be considered in weighing a
18 claimant's credibility include: (1) the claimant's reputation for
19 truthfulness; (2) inconsistencies either in the claimant's testimony or
20 between the claimant's testimony and her conduct; (3) the claimant's
21 daily activities; (4) the claimant's work record; and (5) testimony from
22 physicians and third parties concerning the nature, severity, and effect
23 of the symptoms of which the claimant complains. See Thomas v.
24 Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002); see also 20 C.F.R.
25 § 416.929(c).
26

27 The ALJ found that plaintiff's "medically determinable impairment
28 could reasonably be expected to result in the assessed limitations"

1 (A.R. 24.) However, the ALJ cited no evidence of malingering by
2 plaintiff. Accordingly, the ALJ's reason for rejecting plaintiff's
3 credibility must be clear and convincing.

4
5 The ALJ failed to explicitly state precisely why he found plaintiff
6 not credible. While the Commissioner now offers several reasons to
7 justify the ALJ's adverse credibility determination -- including
8 plaintiff's poor compliance with treatment, his criminal history, and
9 his performance at the consultative examination with Dr. Suzanne Ashman
10 -- the ALJ did not identify any such factors as supporting his
11 credibility finding. The Court cannot entertain these post hoc
12 rationalizations now proffered by the Commissioner. See, e.g., Orn, 495
13 F.3d at 630 ("We review only the reasons provided by the ALJ in the
14 disability determination and may not affirm the ALJ on a ground upon
15 which he did not rely"); Connett, 340 F.3d at 874 (finding that "[i]t
16 was error for the district court to affirm the ALJ's credibility
17 decision based on evidence that the ALJ did not discuss").

18
19 The ALJ's failure to make specific findings regarding plaintiff's
20 credibility, much less to proffer clear and convincing reasons to
21 support his adverse credibility determination, constitutes reversible
22 error.

23 24 **IV. Remand Is Required.**

25
26 The decision whether to remand for further proceedings or order an
27 immediate award of benefits is within the district court's discretion.
28 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no

1 useful purpose would be served by further administrative proceedings, or
2 where the record has been fully developed, it is appropriate to exercise
3 this discretion to direct an immediate award of benefits. *Id.* at 1179
4 ("[T]he decision of whether to remand for further proceedings turns upon
5 the likely utility of such proceedings."). However, where there are
6 outstanding issues that must be resolved before a determination of
7 disability can be made, and it is not clear from the record that the ALJ
8 would be required to find the claimant disabled if all the evidence were
9 properly evaluated, remand is appropriate. *Id.* at 1179-81.

10
11 Remand is the appropriate remedy to allow the ALJ the opportunity
12 to remedy the above-mentioned deficiencies and errors. *See, e.g.,*
13 *Benecke*, 379 F.3d at 593 (remand for further proceedings is appropriate
14 if enhancement of the record would be useful); *see Dodrill v. Shalala*,
15 12 F.3d 915, 918 (9th Cir. 1993)(ordering remand so that the ALJ could
16 articulate specific and appropriate findings, if any existed, for
17 rejecting the claimant's subjective pain testimony).

18
19 On remand, the ALJ should revisit his consideration of the various
20 medical opinions. Additionally, to the extent necessary, the ALJ should
21 develop the record further to resolve any conflicts or ambiguities with
22 respect to the treatment records and RFC questionnaires. In addition,
23 should the ALJ again find plaintiff to lack credibility, the ALJ must
24 set forth clear and convincing reasons for any such adverse credibility
25 determination.

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1 **CONCLUSION**

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3 Accordingly, for the reasons stated above, IT IS ORDERED that the

4 decision of the Commissioner is REVERSED, and this case is REMANDED for

5 further proceedings consistent with this Memorandum Opinion and Order.

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7 IT IS FURTHER ORDERED that the Clerk of the Court shall serve

8 copies of this Memorandum Opinion and Order and the Judgment on counsel

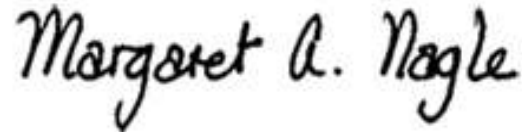
9 for plaintiff and for defendant.

10

11 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

12

13 DATED: July 26, 2012

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15 _____

16 MARGARET A. NAGLE
UNITED STATES MAGISTRATE JUDGE

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